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No. 666.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY

To "Brief for the United States in Opposition."

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QUESTIONS PRESENTED.

The questions presented are those appearing at pp. 2-3 of the Petition for Writ of Certiorari.

ARGUMENT.

At p. 7 of Brief of United States in Opposition it is stated:

> "They concede, too, that if the State officers themselves had done, or had agreed to do, what the jury found petitioners planned—institute a prosecution based on fabricated evidence which had been created for the specific purpose of bringing about the arrest and trial of Ratterman—their conduct would have violated Section 242."

Petitioners do not concede anything of the kind.

This quoted statement of the Government's Brief is wholly irrelevant. The state officers (police) did not violate § 242. The police did not agree with petitioners to violate § 242. The police did not agree or conspire with petitioners to do anything. And petitioners did not violate § 242; nor did they violate § 2. So said the jury by its verdict acquitting petitioners upon Count Two which alleged an offense under both § 242 and § 2 and acquitting the police on Count One which alleged a conspiracy under § 371 to violate § 242.

From the erroneous statement of a concession by petitioners, the Government's Brief then continues at p. 7 to put the question:

> "Whether it is possible for private persons to commit an offense under 18 U. S. C. 242 by wilfully causing **innocent** police officers (that being the jury's verdict) to act under color of law to deprive an individual of his civil rights?"

and adopt in a footnote the completely incorrect statement that:

> "if the substantive offense can thus be committed by one or more private persons, then, clearly, an

agreement to commit such offense is an unlawful conspiracy under 18 U. S. C. 371 whether or not the plan succeeds and the substantive offense occurs."

The question for decision is not that stated by the Government. It has no place upon this record. Neither petitioners nor any defendant committed an offense under § 242 and the jury's verdict belies the Government's assertion that petitioners caused innocent police to act under color of law to deprive an individual of his civil rights. The verdict establishes the direct opposite of what the Government now and for the first time contended upon appeal.

The above quoted Footnote 2 from the Government's Brief is an astounding statement. It assumes that a single private person wholly incapable of acting under color of law could commit the offense denounced by 18 U. S. C., § 242, when the statute by its express terms denounces only acts under color of law. If the Government's supposition that one or more private persons wholly incapable of acting under color of law without the interposition of state action can commit the offense denounced by § 242, then there is brought within the statute crimes done by men in general in the ambit of their personal pursuits and if so applied would be constitutionally impermissible under the holding of Screws v. United States, 325 U. S. 91, 89 L. ed. 1495, 162 A. L. R. 1330, 65 S. Ct. 1031, where the Court said:

"As stated in United States v. Cruikshark, 92 U. S. 542, 553, 554, 23 L. ed. 588, 592, 'It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.' And see United States v. Fox, 95 U. S. 670, 672, 24 L. ed. 538, 539. It is

only state action of a 'particular character' that is prohibited by the Fourteenth Amendment and against which the Amendment authorizes Congress to afford relief. Civil Rights Cases, 109 U. S. 3, 11, 13, 27 L. ed. 836, 839, 840, 3 S. Ct. 18. Thus Congress in § 20 of the Criminal Code did not undertake to make all torts of state officials federal crimes. It brought within § 20 only specified acts done 'under color' of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.

"This section was before us in United States v. Classic, 313 U. S. 299, 326, 85 L. ed. 1368, 1383, 61 S. Ct. 1031, where we said: 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.' "

In the concurring opinion in **Screws** by Mr. Justice Rutledge in 162 ALR at p. 1356, he wrote in speaking of Section 20 which is now codified as 18 U. S. C., § 242:

"Section 20 strikes only at abuse of official functions by state officers. It does not reach out for crimes done by men in general. Not murder per se, but murder by state officers in the course of official conduct and done with the aid of state power, is outlawed."

Thus where the plan or object of the conspiracy does not include a co-conspirator or one capable of violating § 242, an agreement of two private individuals to commit such offense, is not an unlawful conspiracy under § 371. The plan could only succeed and the substantive offense could only occur, through the guilt of one capable of violating § 242.

Count One of the indictment under which petitioners were convicted, charged that Lester and Buccieri conspired with the Newport police officer Ciafardini and others to have the police officers, "while acting in their official capacity . . . wilfully deprive George Ratterman . . . of the right to be free from arrest by an officer acting arbitrarily and without legal justification of cause" and further that the plan of the conspiracy was to have Ciafardini and the other officers arrest Ratterman, charge him with a violation of law and cause his conviction, "all knowing him to be innocent."

There is not a hint in Count One of the indictment that Petitioners were charged as private persons with conspiracy to cause innocent police officers to act under color of law to deprive Ratterman of his civil rights. The Government offered no evidence to this effect nor was such a charge submitted to the jury.

The majority opinion of the Court of Appeals and the Government's present position in changing the charge of the indictment falls far short of the established requirement that an indictment must specify the elements of the offense intended to be charged and apprise the defendant of the case that he must be prepared to meet. Russell v. United States, 369 U. S. 749, 760, 772 and cases therein cited. The Government is not entitled to enlarge the indictment by revamping the whole theory of the prosecution and making new and additional charges against the petitioners for the first time in the course of proceedings before the Court of Appeals and this Court. Dissenting opinion of Justice Stewart joined by Justice Fortas in United States v. Fabrizio decided December 12, 1966, 35 United States Law Week, 4082-4083.

In that case Mr. Justice Stewart said:

"We long ago rejected the notion that 'it lies within the province of a court to change the charging

part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes. . . .' **Ex parte Bain,** 121 U. S. 1, 10. See **Stirone v. United States,** 361 U. S. 212; **Russell v. United States,** 369 U. S. 749, 770-771. As the Court in **Bain** observed, 'Any other doctrine would place the rights of the citizen . . . . at the mercy or control of the court or prosecuting attorney. . . .' 121 U. S. at 13."

However, had the indictment charged these Petitioners alone as private individuals with conspiracy to deprive Ratterman of his civil rights by causing innocent police officers to act under color of law to deprive him of his civil rights, they would have been charged with a non-existent Federal crime.

In Footnote 5 on p. 10 of the Government's Brief, it is said that the record of this case shows that the instructions pertaining to the element of specific intent required by this Court's decision in Screws v. United States, 325 U. S. 91, were clearly sufficient. The instructions appear at length in Appellants' Appendix in the Court below at pp 225a to 253a and examination reflects no such asserted compliance with the **Screws** case and as that opinion was understood by the Fifth Circuit in Pullen v. United States, 164 F. 2d 756. These two cases in their relation to the case at Bar are fully discussed in the Petition for Writ of Certiorari at pp. 51-55.

COMMENT ON CASES CITED IN GOVERNMENT BRIEF.

At p. 8, Footnote 4, the case of Boushea v. United States (1949-8th), 173 F. 2d 131, is cited. It appears that in this case Boushea and one Fontaine were indicted un-

der 18 U. S. C. § 80, later changed to § 287, 1001, for making or causing to be made or presenting or causing to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States . . . any claim upon or against the government of the United States, ... knowing such claim to be false, fictitious or fraudulent. The Court at p. 134 of the report states that the defendants were not mere aiders and abettors but were principals and guilty of the substantive offense. No conspiracy was alleged and the case contains no discussion of the offense of conspiracy. And, of course, under the statute in Boushea, any person whomsoever would possess capacity to violate its terms. Boushea cites United States v. Gooding, 25 U. S. 460, 12 Wheat. 460, 6 L. Ed. 693 (referred to at p. 7, Footnote 3 of Government Brief) as authority that one may be guilty who commands or procures a crime to be done. But Gooding qualifies this statement by holding that this princple applies only "if it is done", that is, there must be a completed offense. At Bar, there was no offense under 18 U. S. C. § 242 or § 2. Boushea is authority for Petitioners, not for the Government.

Nor is Cohen v. United States (1907-2nd), 157 F. 651 (incorrectly cited by the Government in Footnote 4 at p. 8 of Brief as being reported in 157 F. 2d 651) authority against Petitioner's contention. In Cohen, appellants were charged with conspiracy that a bankrupt corporation should conceal its assets. The corporation—the bankrupt—could violate the provisions against fraudulently concealing its assets. Since the police officers were found innocent under Counts One and Two of the indictment, neither Petitioners acting alone or with each other, could violate 18 U. S. C. § 242 or § 2, as neither possessed capacity to act under color of law.

The case of Kaufman v. United States (1914-2nd), 212 F. 613 (also incorrectly cited in Government Brief as

United States v. Kaufman, 212 F. 2d 613), does not support the Government's position. Kaufman was indicted and convicted for aiding and abetting the Daisy Shirt Company, a bankrupt, in concealing its assets from the Trustee in Bankruptcy. The bankrupt company possessed the capacity to violate the statute as held in Cohen v. United States, supra, hence any person whomsoever could aid and abet such concealment. There was no charge of conspiracy. Kaufman is an aiding and abetting case only. The completed crime was shown to have been committed. At Bar no substantive offense was committed and Petitioners have been acquitted under both 18 U. S. C., § 242 and § 2. Petitioners as private individuals, acting without the police were incapable of violating § 242 or § 2.

Again at p. 8, Footnote 4 of Government Brief the case of United States v. Selph, 82 F. Supp. 56 (S. D. Cal.), is cited. This case detefmines only the sufficiency of the indictment. The indictment was under 38 U. S. C., § 697 and § 715, and alleged that the sole defendant did "knowingly cause to be made and did knowingly aid, assist, and procure the making and presentation of a false and fraudulent certificate and paper concerning a claim for benefits under the Service Men's Readjudgment Act of 1944, 38 U. S. C., § 694, et seq." Under 18 U. S. C., § 2, the prosecution charged the direct commission of the offense and sustained it by proof of aiding and abetting. Here again there is not even a hint of a conspiracy. Selph was the only person indicted, tried and convicted. Here also the false report of prices paid for homes was made which established the completed offense which Selph was indicted for aiding and abetting.

In citing 1 Wharton, **Criminal Law and Procedure** (1957), § 106, pp. 230-231, Petitioners assume that the Government relies upon the statement in the text that:

"The principal in the first degree actually commits the crime, either by his own hand or by the hand of an innocent agent."

Petitioners have no quarrel with this text. But it of necessity assumes that a completed crime has been committed either by the hand of the principal or his agent, whether the agent be innocent or otherwise. But in the case at Bar, no offense under U. S. C., § 242 or § 2 has been committed.

The text of 1 Chitty, **Criminal Law** (5th ed., 1847), p. 256a, as in Wharton, in stating the criminal responsibility of one who commits a crime through an agent, presupposes the commission of the crime, the completed offense. The Government's theory ignores the essential elements necessary to violate § 242; that is, a wilful act under color of law, and presupposes a violation of § 242 when the record shows the contrary.

On p. 8 of the Government's Brief, the case of United States v. Inciso, 292 F. 2d 374 is cited. Inciso is not a conspiracy case. The appellant there was convicted of the substantive offense denounced by 29 U. S. C., § 186 (b), and 18 U. S. C., § 2 (b). By reason of the operation of 18 U. S. C., § 2 (b), he was convicted as a principal for violation of 29 U. S. C., § 186 (b), the substantive charge. There is not even a hint in the case of any conspiracy. Inciso alone was convicted. The principal distinction between Inciso and the case at Bar is that in the former it was established that the labor union represented by Inciso actually unlawfully received money from the employer thereby establishing the completed offense denounced by the statute. No such situation is presented by the record in the case at Bar.

CONCLUSION.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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December 20, 1966.